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SUMMARY OF CASES

RELATING TO

FARMERS' COOPERATIVE ASSOCIATIONS

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OPA Dairy Association Price Case

In the case of Chester Bowles, as Administrator of the Office of Price Administration v. Inland Empire Dairy Association, 53 F.Supp.210, decided by the Federal District Court of the United States for the Eastern District of Washington on December 27, 1943, it appeared that the plaintiff instituted a suit against the Inland Empire Dairy Association for the purpose of enjoining this defendant "from paying patronage dividends to its member and non-member patrons and to compel defendant to charge back against its patrons certain dividends declared on April 30, 1943." In brief, it was the contention of the plaintiff that the Dairy Association had paid and was proposing to pay to its patrons amounts in excess of sums which it was alleged could be paid for milk to producers of milk under the OPA price regulations.

It appeared that the Dairy Association was operating under a marketing contract with its members which provided that -

> "the Association agrees to buy and receive such milk or cream and to remit to the member for the same on the basis of market prices as conclusively established by the Association from time to time. The market price shall be established on the basis of grades and quality."

While the nonmembers from whom the Association received milk did not sign contracts, the court said:

> "The testimony is that, while the non-members do not sign any contract, they are all familiar with the contract and that they and the Association recognize them as being subject to the terms of the contract and entitled to its benefits."

The Association made advances to its members and to nonmember patrons from whom it acquired milk, which advances appear to have been equal to the price paid by distributors of milk to their patrons. In this connection it was alleged that on February 13, 1943, the OPA issued Maximum Price Regulation No. 329 with the approval of the Secretary of Agriculture, and -

> "That said Maximum Price Regulation 329 provides that on and after February 13, 1943, regardless of any contract, agreement, or other obligation, no purchaser, in the course of trade or business, shall buy or receive fluid milk from any producer thereof at a price higher than the maximum permitted by said regulation. Said regulation further provides that such maximum price for fluid milk shall be the

highest price each purchaser of fluid milk from a producer paid that producer for such milk received during January 1943, or the minimum producers' price established under the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, whichever is higher. That no minimum producers' price has ever been established under the provisions of said Agricultural Marketing Agreement Act of 1937, as amended, for either the State of Washington or the State of Idaho."

In the answer filed by the Dairy Association to the complaint which was brought against it, the Dairy Association, among other things, said:

"Answering paragraph VII. of said first cause of action, defendant admits that it has paid those shippers who were entitled to receive same, the sum of Four thousand, four hundred, eighty-one and 89/100($4481.89) Dollars which was a balance due them from the sale of their product for the year ending April 30th, 1935, as shown by defendant's books, and that said sum was paid to milk and cream shippers only who were doing business with this defendant during said year ending April 30th, 1935.

"Admits that on April 30th, 1943, defendant paid to its fluid milk shippers the sum of Eight thousand, four hundred, forty-one and 97/100($8441.97) Dollars, and that said amount was pro-rated to said fluid milk shippers, according to the amount of milk shipped by them to said Association, during said six months' period, and that said sum thus paid to members and non-members alike, represents the balance due them from the sale price of their products, less expense of operation for said six months' period."

The District Court refused to enjoin the Dairy Association, and the reasons for this refusal will be given later.

It appears to have been agreed that the Dairy Association had not sold milk in excess of the prices fixed by OPA regulations. In this connection the court said:

"It is stipulated that the ceiling price for the sale of fluid milk at retail in this period is 13 cents per quart. No question is raised by plaintiff concerning the compliance by defendant with this price regulation and the sole question involved in this case is whether the money paid by the defendant to its patrons may properly be termed the 'price paid.'"

The court declared that "Unquestionably, stripped to its essentials, the question for determination is whether defendant's patrons sold milk to defendant."

The reasoning of the court appears to have been that although the Dairy Association was functioning under a so-called purchase and sale type of contract, that it was simply acting as an agent for its patrons in the sale of their milk. Apparently the court was of the opinion that inasmuch as a farmer could have personally taken his milk to town and received the full retail price therefor without violating the OPA price regulations, that a farmer could have had his hired man, or a cooperative association that was functioning as an agent, do the same thing without violating OPA price regulations.

It was apparently argued by the attorneys for OPA that the so-called "excess payments" made by the Dairy Association to its patrons were patronage dividends, and there is considerable discussion in the opinion regarding the right, from the standpoint of OPA regulations, of a cooperative association to pay patronage dividends to its patrons, and the court was clearly of the opinion that the payment of such dividends did not operate to violate OPA price regulations. In this connection it was urged that -

> "'. . . A patronage dividend . . . paid to a so-called member of an organization whose membership fee bears no relation to the amount of his commodities handled by the association, must be deemed part of the "price" of such commodities for the purpose of determining whether or not the ceiling price fixed by the Maximum Price Regulations have been exceeded.'"

It was further contended "that defendant forfeited its right to assert that these patronage dividends are not a part of the price because, in declaring its April dividends, it limited them to the patrons furnishing fluid milk and did not permit the furnishers of sour cream to participate."

In answer to these contentions the court said in part:

> "Clearly, if defendant diverted returns earned by the sale of sour cream to the patrons furnishing fluid milk, such device would be construed as an increase in the price received by fluid milk patrons for their products and, as a result thereof, such receipts would exceed 13¢ per quart for milk ultimately delivered to the consumer and would violate the price ceiling regulation. The testimony does not bear out this contention. Defendant's testimony is undisputed that all of the money paid to fluid milk patrons resulted exclusively from fluid milk sales. The books of the

defendant are highly departmentalized and had this diversion and evasion occurred, plaintiff had ample opportunity to prove it. Plaintiff bases this contention exclusively on the fact that when, in the past, patronage dividends were paid, the same amount was received by the furnishers of sour cream as was received by the furnishers of fluid milk. That proves exactly nothing. The patronage dividends to be paid to producers in a farmers' cooperative need not be and should not be the same to every patron. Since October 24, 1844, when the Rochdale Society of Equitable Pioneers registered under the Friendly Societies Act, the so-called Rochdale principles have been recognized. ('Digest of Cooperative Laws at Home and Abroad,' Margaret Digby, Horace Plunkett Foundation; 'Abstracts of the Laws Pertaining to Cooperatives in the United States of America, its Possessions and Territories,' p. 56, Ostrolenk and Tereshtenko; 'The English Cooperatives,' p. 24, Elliott; 'Cooperative Enterprise in Europe,' a Report of the Inquiry on Cooperative Enterprise to the President, February 19, 1937, p. 20). While these principles have been variously stated by different authorities, they all agreed upon the inclusion therein of the principle that distribution of the surplus originating in the economic activity of an organization is in direct proportion to the participation of members. As Mr. Justice Brandeis said in Frost v. Corporation Commission, 278 U.S. 515, 546: 'no one plan of organization is to be labeled as truly co-operative to the exclusion of others.' No student of cooperatives will deny that if one principle of cooperatives has been given more universal recognition than any other, it is the one under which patronage dividends are paid upon a patronage basis. Plaintiff's contention in this regard is in direct contradiction to this principle. To accept plaintiff's contention that defendant should give to the patrons furnishing sour cream a part of the returns resulting from the sale of fluid milk would do violence to almost a century of cooperative practice."

The plaintiff argued that inasmuch as the Dairy Association had done more business with nonmembers than the 15 percent permitted by the State statute under which it was incorporated, it could not claim that it was operating as a cooperative. In regard to this contention the court said:

"This, moreover, is an issue which only may be raised by the State of Washington. While such activities may have been ultra vires of the corporation, only the sovereign from which the corporation derived its power can object. National Bank v. Matthews, 98 U.S. 621, 628; National Bank v. Whitney, 103 U.S. 99; Swope v. Leffingwell, 105 U.S. 3; Reynolds v. Crawfordsville First National Bank, 112 U.S. 405, 413;

Lantry v. Wallace, 182 U.S. 536. See, also, Guaranty Trust Company v. United States, 9th Cir., decided November 29, 1943, __ F. (2d) ___; Washington Co-operative Egg & Poultry Association v. Frederick A. Taylor, 122 Wash. 466, 477; Boyle v. Pasco Growers Association, 170 Wash. 516."

The court further pointed out that from a Federal standpoint there was ample authority, based upon the Capper-Volstead Act and other Federal statutes, for the view that a cooperative could do one-half of its business with nonmembers. In this connection the court said:

"If the Administrator of O. P. A. is to heed Congressional intent in determining when an association is or is not a cooperative on the basis of its non-member participation, he must accept the 50 per cent rule as originally enunciated in the Capper-Volstead Act."

As pointed out earlier, the plaintiff complained because the Dairy Association, which was operating on a revolving fund basis, had returned in 1943 amounts which it had retained in 1935. It is quite difficult to see how the return of this money which was accumulated in 1935 could have, strictly speaking, any relation to the prices which the Association paid to its members on account of milk in 1943. The return of capital accumulated in 1935 would appear to be closely analogous to the retirement of stock by a corporation.

Ordinarily, I believe it is accepted that a patronage dividend is a distribution which a cooperative association makes without being technically and legally obligated to do so. In other words, in an instance in which a cooperative association under its marketing contract is obligated to make payments to its members equal to the resale price which it receives for the commodities delivered by its patrons, any payments which are made on account of the terms of the marketing contract are not generally regarded as patronage dividends. In the instant case it is not entirely clear whether some or all of the payments in question were payments which the Association was obligated to make in accordance with the terms of its marketing contract. Payments which are made by an association in strict accord with its marketing contract are, of course, simply a compliance by the association with the terms of the contract, and obviously are payments with respect to which the association has no discretion. On the other hand, true patronage dividends are ordinarily regarded as payments with respect to which an association, through its board of directors, has discretion comparable with that ordinarily possessed by the board of directors of any corporation.

The court, in emphasizing the fact that if the Association had diverted amounts saved or earned in the handling of sour cream, to the patrons who furnished fluid milk, would in this way violate the price regulations

of OPA, was, of course, emphasizing the fact that such a distribution would not be a distribution of earnings or savings effected on the fluid milk delivered by the Association's patrons. This would seem to be a sound conclusion. Moreover, a true patronage dividend may consist only of earnings or savings which, broadly speaking, are effected on the commodities which an association has handled for the patrons to whom the patronage dividend is paid, and if, for instance, earnings or savings effected on the business of nonmembers is diverted to members through a so-called patronage dividend, the patronage dividend has not been regarded as a true patronage dividend by the Bureau of Internal Revenue (see Cumulative Bulletin III-2, 238).

The court, in concluding its opinion, said:

> "This Court is not interested in the question of the advantages or disadvantages of the maintenance of cooperative associations as a part of our economic structure. It is interested in the economic result of its decision only to the extent that understanding that result may assist it in ascertaining Congressional intent. No one can deny the almost devastating effect upon cooperatives if patronage dividends are proscribed. The patronage dividend device has been woven into the warp and woof of the cooperative system. To take from cooperatives the right to pay patronage dividends ultimately would destroy the cooperative structure. The cooperating producer agrees to restrictions on his method and volume of production and to control of his output. He assumes the burden of any losses involved in the processing, distribution and sale of his products. The responsibility for mistakes of management and losses in collections must be borne by him. None of these burdens or responsibilities are borne by the producer who sells to an independent distributor. Once his product is sold at a price, his responsibility ends. He controls his production and sells to whom and for how long he pleases. No one knows how long the war will last nor how long thereafter price controls will be in effect. It requires no fanciful reasoning to conjure up doubts concerning the continued existence of cooperatives deprived of the right to pay patronage dividends. The stark fact is that the consistent extension of the Administrator's position here would make a war casualty of the Farmer Cooperative System. The long-range objective of the Price Control Act was to prevent economic dislocation. Remembering the widespread use of farmer cooperatives and the well-established legislative and administrative policy of our Government in fostering them, I cannot believe the Congress intended thus to strike them down. In the light of this background, the Court would not be justified in so concluding without a more clearly expressed indication of Congressional

intent. The Congress gave to the Administrator the power to control the 'price' in the event of a 'sale' (50 U.S.C.A. Sec. 942 (a) and (b)). Defendant's patrons do not sell their products to defendant. Defendant acts merely as the patrons' agent in selling patrons' products to the ultimate consumer. The only 'price' involved in the transaction occurs in that sale. The Administrator can and does and will control that price. The Congress has given him no power artificially to determine that deliveries to defendant by its patrons constituted sales."

In the next article will be found a copy of an order issued by OPA covering the payment of patronage dividends by marketing cooperative associations. It is understood that this order was in the course of preparation prior to the decision in the Inland Empire Dairy Association case.

Payment of Patronage Dividends by Marketing Cooperative Association

The Office of Price Administration, under the above heading, has issued Supp. Order 84 which appears in the issue of the Federal Register for February 15, 1944, and reads as follows:

"§ 1305.215 Payment of patronage dividends by marketing cooperative associations. (a) This order applies to the payment of patronage dividends by marketing cooperative associations to their patrons (members or non-members) in connection with any commodity subject to a price regulation issued by the Office of Price Administration unless the applicable price regulation contains different provisions.

"(b) No marketing cooperative association may pay to any patron and no patron may receive, through the payment of patronage dividends or otherwise, more for any commodity than the ceiling price applicable to sales of that commodity by the patron to non-cooperative distributors regardless of whether the association acquires title to the commodity or acts as selling agent for the patron except as provided in this order.

"(c) Patronage dividends may be paid by marketing cooperative associations to or received by their patrons in connection with a commodity when the dividend plus the original payment to the patron results in his receiving more for the commodity than the applicable ceiling price for sales by him to non-cooperative distributors only if all the following conditions are met:

"(1) The association operates on a cooperative basis for the purpose of marketing the commodities of its patrons solely for their mutual benefit, and conforms with all the requirements of the applicable statutes of a state or territory.

"(2) The association does not handle a greater proportion (in terms of dollar value or unit volume) of non-member business in any fiscal year than it handled during the calendar year 1943, or its fiscal year ending in 1943, or, if the association was not in existence during all of 1943, it does not handle a greater proportion of non-member business than it handled during the first fiscal or calendar year of its existence: Provided,

That, for purposes of this paragraph (c), there shall be disregarded in determining the proportion of member to non-member business transaction (transacted) by the association, any business done by it for and at the request of the United States or any of its agencies as part of a special government procurement program which makes it necessary for the association to obtain commodities out of the normal course of its business from other than its customary sources of supply.

"(3) The association is not controlled, with respect to finances, policy, payment of patronage dividends, employment or compensation of personnel or agents, or in any other way by any person (other than a cooperative association).

"(4) The association does not offer or agree to pay a patronage dividend of a definite amount or at a specific rate.

"(5) The association does not pay patronage dividends except at the end of the association's fiscal year or at the end of intervals of not less than six months where the books of the association are regularly closed at the end of such intervals.

"(6) If the association in the payment of patronage dividends customarily differentiates between, and maintains separate accounting records for, various operations in its business (differentiating, for example, between operations in different areas, or between the marketing of different commodities or the products of different types or grades of the same commodity), the patronage dividend paid to patrons whose commodities are marketed in one such operation in its business does not include any sums derived from other such operations.

"(7) In the case of a farmers' cooperative association, the association also conforms with all the requirements of the Capper-Volstead Act.

"(d) 'Price regulation,' as used in this supplementary order, means a price schedule effective in accordance with the provisions of section 206 of the Emergency Price Control Act of 1942, as amended, a maximum price regulation, or temporary maximum price regulation issued by the Office of Price Administration, or any amendment or supplement thereto or order issued thereunder.

"(e) This order shall become effective February 19, 1944."

Income Not Reduced To Possession

Section 29.42-2 of Regulations 111 issued by the Bureau of Internal Revenue reads as follows:

> "Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt." (Underscoring added.)

The foregoing material appears to have a direct bearing on the question of whether a member of a cooperative association who has had amounts allocated to him on the books of the association should include such amounts in computing his income taxes for the year in which the allocation was made.

In the case of California Employment Commission v. Butte County Rice Growers Association (Cal. App.), 138 P. 2d 347, it appeared that an action was instituted against the Association to recover unemployment insurance contributions and penalties. A judgment was rendered in favor of the Association and the Commission appealed.

The Association contended that it was not subject to the act because its employees were engaged in the performance of agricultural labor. The court said:

> "The Unemployment Act, by the terms of section 7, is specifically made inapplicable to 'Agricultural labor.'"

And that:

> "The only question to be determined is whether the employees of a farmers' cooperative association, composed of members who are actually engaged in farming, organized by law to aid the members only, in growing, handling and marketing their farm products, are deemed to constitute 'agricultural labor.'"

The court further said:

> "October 26, 1914, the defendant, Butte County Rice Growers Association, was duly organized pursuant to law and filed its Articles of Incorporation, authorizing it to purchase seeds, plants and supplies and to perform services, in behalf of the members only, to aid them in growing, handling and marketing rice, vegetables, grains and horticultural products. For that purpose the defendant Association constructed and maintained a warehouse at Richvale in Butte County where the rice of its members was stored, cleaned and prepared for market. Several men were employed as laborers to work in that warehouse. Seeds and supplies for use of the members in planting, growing and marketing their crops were stored in the warehouse and furnished to the members at cost in accordance with the rules and by-laws of the association. That enterprise was operated without profit to the association. Such supplies as chicken feed were occasionally furnished to the employees at cost and charged to their wage accounts. But these items were so inconsequential they are not worthy of consideration in determining whether the association was operated as a commercial enterprise as distinguished from a mere cooperative marketing organization

conducted as an incident to the farming projects of its members. The officers and employees were selected and hired by the directors of the Association as the by-laws direct. We assume all parties to this action desire a determination on its merits of the chief issue regarding the liability of the Association as employer of agricultural labor.

"It may be fairly assumed the Association had no power to, and it did not, engage in any commercial enterprise as distinguished from a nonprofit cooperative organization maintained solely to aid each of its members in cultivating, farming, handling and marketing his own agricultural products."

It appeared that the California Unemployment Commission had issued regulations defining the term "agricultural labor", and if this definition, embodied in Rule 7.1, was valid, the Association was required to make unemployment contributions because the definition defined agricultural labor in such a way as to include the employees of the Association.

The court, on appeal, held the regulation defining agricultural labor to be "an unwarranted and unlawful restriction of the Unemployment Act with respect to the application of that statute to 'agricultural labor'" and said "it is therefore void."

It is clear from a reading of the opinion that the court regarded the Association, which did business for members only, as simply engaged in activities which represented an extension of the agricultural activities of the members carried on by them on their individual farms, and that the Association was simply a medium for furthering such activities. In this connection the court said in part:

"Clearly the defendant Association was organized and the warehouse was maintained as an agency and means of producing, preparing and marketing the crops of the respective members. It furnishes a method of jointly procuring farm supplies and handling the crops of members through their agents and employees in the manner provided by law. In no sense may the business of the Association be deemed to be a commercial enterprise as distinguished from a farming industry. The organization was maintained as a valuable adjunct to the farming activities of each member. The creation of non-profit, cooperative farming and marketing associations was authorized by law to benefit both the producers and the consumers by securing group handling of crops. That procedure is an incident to and a valuable part of the farming enterprise of each member. Recognizing the disadvantages and serious losses sustained by the farmers

and the consumers of food products by individual handling of crops, the Legislature wisely enacted the previously mentioned statute in 1923, 'to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation.' § 653aa, Civ. Code. ***

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"Regarding the nonprofit feature of such associations, section 1192 of the Agricultural Code provides that: 'Associations organized hereunder shall be deemed "non-profit", inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.' (Italics ours.)"

The court distinguished the facts involved in the instant case from other cases in which conclusions inconsistent with that reached in the present case were reached, by emphasizing the fact that in these other cases the associations did not confine their activities solely to their own members, but were engaged, at least in part, in dealing with commodities produced by nonmembers. And in these cases which the court distinguished, the court proceeded on the theory that the cooperatives, apparently on account of the nonmember business, were operating on a commercial basis. With respect to this matter, the following comments were made:

"We heartily concur with the conclusion that when a farmer turns his produce over to an organization which is engaged wholly, or even in part, as a commercial industry in handling, packing, preparing and marketing farm products, regardless of its membership, its employees may not be considered agricultural laborers. Clearly they are then working for a separate industry. That situation is not true in the present action. We are of the opinion that case is not conclusive of the present appeal. The very purpose of the cooperative agricultural marketing association statutes of California, previously mentioned, is to enable the farmers to jointly handle their crops for mutual benefit as a part of their agricultural pursuits. A narrow construction of those statutes would defeat the very purpose for which they were enacted."

The court also said:

"We are of the opinion that paragraph (1) of Rule 7.1, which was adopted by the California Employment Commission, is an unreasonable restriction of the term 'agricultural labor,' as it is used in section 7 of the Unemployment

Insurance Act, and therefore void to that extent. Section 90 of the act authorized the Commission to 'adopt and enforce rules and regulations * * * to carry out the provisions of this act.' The foregoing rule provides in part that, to exempt agricultural labor from the provisions of the act it must be performed 'by an employee on a farm.' Paragraph (2) further declares that 'The services hereinbefore set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced.' The quoted provisions of paragraph (1) of that rule are clear limitations of the ordinary meaning of the term 'agricultural labor,' as it is used in the act. It restricts the evident intention of the Legislature to exclude all agricultural labor whether it be performed on or off the farm belonging to the employer. If paragraph (1) of the foregoing rule should prevail, then a regular farmhand could not haul his employer's hay or fruit to market, without bringing himself within the provisions of the act, because his services would not be performed 'on the farm.' Nor could a fruit grower operate his own fruit dryer on land separated from the farm upon which the fruit is produced, which is a common practice in California, without subjecting his employees engaged in that work to the provisions of the Unemployment Act. Paragraph (1) of the foregoing rule is therefore an unreasonable assumption of legislative power which is prohibited by law." (Italics the court's.)

In the case of Latimer v. United States, 52 F. Supp. 228, a number of cases, several of which involved cooperative associations, were consolidated. In all of these cases the plaintiffs were attempting to recover Federal social security taxes which they had paid. In general, in all of these cases the contention was made that social security taxes were not required to be paid because of the fact that the labor involved was agricultural labor. Some of the labor involved was held to be agricultural labor, and, hence, labor with respect to which social security taxes were not required to be paid, and some was held to be labor subject to the act.

One of the cooperative associations had engaged in "Plowing, discing, planting, cultivating, irrigating, root cutting, spraying, pruning, dusting, fumigating, and other cultural and maintenance labor and services performed for others." All of those engaged in performing this labor were held to be engaged in performing agricultural labor. In this connection the court declared:

"All of such specified services directly and inherently pertain to the farm or orchard. These activities connote true 'agricultural labor.' They are inseparably attached to and associated with the cultivation of products of the soil. The fact that the services are rendered by employees

of an entity other than the owner or tenant of the orchard is of no consequence, as the controlling part of the regulations is paragraph (a) thereof, which contains no requirement as to the status of the employer of the one doing the work specified. It is the kind of work done and the locale of it which controls under the Regulations."

With respect to certain other types of labor, the court said:

"The test for ascertaining whether or not the services in this subdivision should be considered 'agricultural labor' is that established in Stuart v. Kleck, supra [9 Cir., 129 F.2d 400], namely what is the nature of the services furnished and were they performed upon a farm?

"The record in these cases shows that the work done in picking and other harvesting of the fruit is arranged for, directed and supervised by the individual grower in collaboration with the respective packing house manager. It is all done in the grower's orchard, in other words, on the farm, and it all precedes delivery of the fruit for processing or marketing purposes. Thus the stage of operations at which such services cease to be an incident to ordinary farming and become incidental to the commercial operations of the packing house is reached after the fruit has been picked and upon actual delivery of the fruit to the employees of the association for transmission to the packing house. The service of such employees then loses its 'agricultural' nature and is industrial in character and is an 'off the farm' incident to the business of the co-operative packing house as distinguished from farming operations. See Pinnacle Packing Co. v. State Unemployment Comm., supra [unreported decision of Circuit Court of Jackson County, Oregon, decided February 19, 1937]."

In regard to "Executive, administrative, accounting, stenographic, clerical, office and similar types of labor performed with respect to harvested fruit grown by others", the court commented as follows:

"This classification of services in the above actions is 'off the orchard labor,' but even if this type of work had been performed 'on a farm' and for the farmer himself, it does not constitute 'farm' or 'agricultural labor' as such terms are commonly understood, or within the meaning of the Social Security Act and the regulations promulgated in reference thereto. To qualify in this category of work the employees are utilizing trade skill, special training, professional services and experience not in any way particularly associated with farming."

For other material dealing with the general subject of agricultural labor, see Summary No. 2, page 3; Summary No. 5, page 10; Summary No. 8, page 5; Summary No. 10, page 1; and Summary No. 18, page 26.

Right of Nonmembers to Challenge Deductions to be Paid to Cooperative Associations

In Stark et al. v. Wickard et al., decided by the Supreme Court of the United States on February 28, 1944, 12 U.S. Law Week 4190 (reversing 136 F. 2d 786), the Supreme Court held that nonmembers of a cooperative association had a right to challenge a milk marketing order under which, in effect, deductions were made from the prescribed minimum price received for milk of nonmembers of cooperative associations and which was paid to such associations found qualified by the Secretary and which apparently would be engaged in performing services of value to all producers.

In brief, it appears to have been claimed that there was not a statutory basis for the provision in the milk marketing order providing for the deductions in question.

The Supreme Court did not pass upon the merits of the case, but simply held that the complainants were entitled to their day in court. In this connection the court said:

> "It hardly need be added that we have not considered the soundness of the allegations made by the petitioners in their complaint. The trial court is free to consider whether the statutory authority given the Secretary is a valid answer to the petitioners' contention. We merely determine the petitioners have shown a right to a judicial examination of their complaint."

Agreement to be Bound by Amendments to Bylaws Valid

East-West Dairymen's Association brought an action against E. R. Dias and others, to enjoin the named defendant from disposing of his dairy products to persons other than the Association, and for the recovery of damages for the alleged failure to continue delivering dairy products to the Association as provided by contract. From an order denying the motion of the named defendant for a change of venue, he appealed and the judgment was affirmed (East-West Dairymen's Ass'n v. Dias (Cal. App.), 138 P. 2d 772).

It appeared that the contract entered into by defendant with the Association had been entered into in Merced County, California, and the defendant argued that as the contract was silent regarding the place of performance, the County of Merced, the place where the contract was made, must therefore be deemed to be the county in which it was to be performed. In pursuance of Section 395 of the Code of Civil Procedure of California, the defendant contended that he was entitled to a change of venue from Stanislaus County, California, the county in which the suit was brought, to the county of his residence, namely, Merced County.

It was alleged that the contract signed by Dias read in part as follows:

> "The undersigned, a member of East-West Dairymen's Association, a corporation, organized and existing under the laws of the State of California, hereby agrees to avail ourselves of the facilities of said corporation, and states that he has read and is familiar with the articles of incorporation and by-laws of said corporation, and hereby ratifies and adopts the same, and in consideration or our membership in said corporation, hereby agrees to be bound by each provision, agreement and contract therein contained, by any changes or amendments thereto, and by the rules and regulations heretofore or to be hereafter adopted by said corporation * * *".

It was further alleged:

> "that said Member's Contract has never been terminated or ended and is now in full force and effect and said defendant Dias is now and ever since February 23, 1933 has been a member of said plaintiff corporation."

It was further alleged by the Association:

> "that the existing by-laws provided that 'Each member agrees to sell and deliver to the Association's plant in Newman, County of Stanislaus, State of California, all the milk and cream produced or controlled by such member * * *', and that

'Each member's obligation so to market all milk and cream produced and controlled by him shall continue in force and effect for a period of ten years', and thereafter until the filing by the member with the secretary of notice of desire to withdraw from the association."

In brief, it appeared that while the contract entered into by the defendant with the Association did not state the place of performance, the place of performance was subsequently stated in a bylaw adopted after Dias became a member. In view of this fact the court held that as Dias had agreed in his contract to be bound by amendments to the bylaws, that the amendment to the bylaws specifying a place of performance was binding upon him. In this connection the court said:

"An agreement by a member of a cooperative organization to be bound by its by-laws and subsequent amendments thereto is a valid provision and such member is bound by all reasonable amendments to the by-laws that may be thereafter adopted. Witney v. Farmers' Co-op. Grain Co., 110 Neb. 157, 193 N.W. 103; Farmers' Mutual Ins. Co. v. Kinney, 64 Neb. 808, 90 N.W. 926; Hall v. Western Travelers' Acc. Ass'n, 69 Neb. 601, 96 N.W. 170. No claim is made that it was improper to cover the subject of the place of performance in the by-laws nor is it suggested that Newman, the place specified in the by-laws as set forth in plaintiff's complaint, was an unreasonable place to specify for the place of performance. Under these circumstances, we believe it immaterial that the 'Member's Contract' did not expressly specify the place of performance for the effect of that contract, under the authorities cited, was to incorporate within its terms all provisions of the then existing by-laws and all reasonable amendments which might be subsequently made thereto. In other words, for the purpose of determining venue in any action brought under said contract, the place of performance was as effectively fixed by the by-laws as though such place had been expressly fixed in the contract itself or by a provision in the contract expressly permitting the other party to fix any reasonable place for performance. It therefore appears that the authorities which dealt with the ordinary cases involving contracts which were silent as to the place for performance are not applicable here."

As implied in the foregoing quotation, not all provisions which might be included in bylaws are valid as bylaws. Although ordinarily cooperatives have considerable latitude in the subjects that may be covered in bylaws, it is sometimes incorrectly assumed that any material which is included in a purported bylaw results in a bylaw which is binding upon all members, regardless of whether they actually knew of the bylaw. On the other hand, the subjects covered in bylaws must be appropriate therefor, and the bylaws must be reasonable and consistent with the articles of incorporation and the general law of the State in order for the bylaws to be effective, at least as against a member who did not specifically consent thereto.

It has been held that the fact that a member of an association agrees to be bound by all present and future bylaws does not permit an association to adopt bylaws which will deprive him of vested rights under the bylaws which were in effect when he became a member. (Farrier v. Ritzville Warehouse Co., 116 Wash. 522, 199 P. 984; Jaeger v. Grand Lodge, Order of Hermann's Sons, 149 Wis. 354, 135 N.W. 869, 39 L.R.A. (N.S.) 494; Model Land & Irrigation Co. v. Madsen, 87 Colo. 166, 285 P. 1100.)

Agency Contracts - Cooperative Associations

In the case of Irvine Company v. McColgan (Cal. App.), 145 P. 2d 325, the court held that a State franchise tax on a farming corporation based upon the amount of business done by a corporation "within this state", should exclude transactions involving the sale in other States of agricultural commodities made by the farming corporation through the medium of brokers, and, also, through the medium of agricultural cooperative associations functioning on an agency basis.

In this connection the court said:

> "In the case of the products shipped through the cooperative marketing associations this was all done under contracts which obligated the association to market and sell the produce as agents of and for the account of the respondent, and to pay the respondent its pro rata share of the proceeds, less his pro rata share of the costs and expenses. It cannot be questioned that these agreements were contracts of agency. Poultry Producers of Southern California, Inc., v. Barlow, 189 Cal. 278, 208 P. 93; California Bean Growers' Association v. Rindge Land & Navigation Co., 199 Cal. 168, 248 P. 658, 47 A.L.R. 904; Poultry Producers of Central California, Inc., v. Murphy, 64 Cal. App. 450, 221 P. 962. While the respondent acted through agents it carried on these marketing transactions in the other states and thus did business in those states as that term is defined in the statute in question."

Member of Milk Association Enjoined

Central Ohio Co-Operative Milk Producers, Inc., of Columbus, Ohio, instituted a suit against one of its members, Arthur C. Pestel, a producer, for the purpose of preventing him from delivering milk to a milk distributor in Columbus other than the distributor specified by the Co-Operative.

In an unreported opinion rendered on January 25, 1944, by the Franklin County Common Pleas Court, the contract of the Co-Operative, a milk bargaining association, was held to be valid, and the defendant was enjoined from delivering his milk other than in accordance with the contract which he had entered into with the association. The court based its decision on the case of Grant County Board of Control v. Allphin, 152 Ky. 280, 153 S.W. 417, and the case of Columbus Fruit & Cooperative Association v. Reeb, 2 Ohio Opinions, 109.

After referring to the two cases just referred to, the court said:

> ". . . the case under consideration presents the same question, and that the two cases are not distinguishable either in principle or fact.
>
> "The question raised by the second defense relative to the title to the milk is, in the opinion of this court, immaterial. By the terms of his contract defendant has agreed to deliver his milk as directed by plaintiff. This is found in item 4 of said contract, the wording of which is as follows:
>
> > "'The producer agrees * * to deliver such products at the time and to the places and persons as designated from time to time by association.'
>
> "The association having directed defendant to deliver his milk to The Model Dairy Company, it becomes immaterial, so far as this case is concerned, whether the milk when delivered is the property of plaintiff or defendant.
>
> "The third defense is a charge, in effect, that plaintiff is only seeking to force delivery of milk to The Model Dairy Company to enforce a secondary boycott against Pestel Milk Company, to which company defendant and other producer members had long been delivering their products.
>
> "The evidence is that Pestel Milk Company had refused to cooperate with plaintiff with respect to permitting its

auditor to examine Pestel's books, and had refused to pay to plaintiff deductions which it had made from milk received from members of plaintiff association; that plaintiff then negotiated a more favorable contract with The Model Dairy Company. If it had the right under the law and its contracts with producers to make such a contract for the sale of producers' milk, the fact that another company thereby was cut off from some of its source of supply would not amount to a secondary boycott.

"The reason for the change in marketing milk of its producers is certainly a valid one, and plaintiff, as marketing agent, had a perfect right to determine where the milk of its producers should be delivered. Its object, manifestly, is to provide the best market available, and Pestel had the same opportunity as Model to furnish such a market, but seems to have failed to avail itself of the opportunity.

"The fourth defense is that plaintiff has not complied with the statutes which govern in case of cooperative associations, and it is pleaded that one of the reasons for such failure is that there is no provision for the payment of liquidated damages in case of breach of contract by the members of the association.

"It is to be noted that the statute provides that such a provision <u>may</u> be incorporated in the contracts between the association and its members. This is purely permissive and not obligatory.

"The second reason advanced is that plaintiff, although a non-profit organization, has organized a subsidiary corporation known as Dairymans Express, Inc., which is a corporation for profit.

"Assuming, for the sake of argument, that this is an ultra vires act, it cannot affect the issues here involved, and that is whether defendant may be prevented from breaching his contract with plaintiff, where that contract is made in the valid exercise of the corporation's powers.

"This same reasoning applies to the third, fourth, and fifth grounds pleaded in the fourth defense.

"The fifth defense again raises the question as to the right to equitable relief, and pleads that damages is the sole remedy available to plaintiff. This has already been discussed and decided.

"At the trial defendant made the claim that the tests of The Model Dairy Company showed a less butterfat content than those of Pestel Milk Company, and since the price to be paid is based on the butterfat, that he is not receiving his proper compensation, but a less amount than that paid by Pestel. If the test is not correct as made by Model the contract between plaintiff and Model provides for a test by a department of the Ohio State University, and there seems to have been no resort to this service as provided by the contract. Every safeguard seems to be provided in order that the producer is paid according to the quality of his milk, and that is subject to accurate determination. It is conceded that the tests customarily show a variation in butterfat content of a given producer's milk from time to time, so that variations do not of themselves prove an erroneous or false result, so that the claim of defendant that his milk is not properly tested does not entitle him to refuse to perform his contract.

"The court, therefore, concludes that the contract here involved, being a valid and binding agreement, for the breach of which there is no adequate remedy at law, that equity in order to properly protect the rights of the plaintiff should and hereby does enjoin its breach, and the temporary restraining order heretofore issued is made permanent."

Union Agreement Provisions

The United States Department of Labor has prepared a comprehensive publication (Bulletin No. 686) of over 300 pages, bearing the above title. As this title indicates, the bulletin contains copies of suggested provisions covering a wide field for inclusion in agreements to be entered into by employers with labor unions. It also contains much valuable information regarding labor matters.

A restricted number of copies may be obtained free of charge from the United States Department of Labor, and they are for sale by the Superintendent of Documents, Washington, D.C., for 35¢ per copy.

The publication should be of great help to any attorney who has occasion to prepare an agreement to be entered into by an employer with a labor union.